U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 19 2005
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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in Virology from the [redacted] The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

The decision in *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Comm. 1998), sets forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, virology, and that the proposed benefits of his work, improved containment of viral diseases, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

As stated above, the petitioner obtained his Ph.D. [redacted] He then worked as a postdoctoral fellow at the [redacted] In 1999, the petitioner began working as a postdoctoral research associate at the [redacted] In 2001, he was employed in the same position at [redacted] before returning to the [redacted] in 2002 as a research assistant professor. In support of his accomplishments at these institutions, the petitioner submitted reference letters from colleagues who worked with him at these institutions; two published articles, one of which was cited seven times (only three of which are by independent researchers); four abstracts; grant applications; professional memberships and a single local news article.

The director concluded that the references from colleagues did not establish the petitioner's influence in the field, that his articles had not been widely cited, and that the petitioner had not submitted other evidence indicative of an influence in the field.

On appeal, counsel asserts that the director erred in failing to consider the petitioner's accomplishments prior to obtaining his Ph.D. and comparing the accomplishments of the petitioner with those of his references. In addition, counsel asserts that letters from colleagues should not be presumed as "biased or less significant." Counsel cites a nonprecedent 2001 decision issued by the AAO for the proposition that reference letters from colleagues should not be dismissed without consideration of the stature of the authors. Counsel concludes that the director erred in failing to consider the petitioner's professional memberships and his role as identified on the submitted grant applications.

Regarding the petitioner's academic accomplishments, counsel misreads the director's decision. The director did consider the petitioner's accomplishments while studying for his Ph.D. In fact, the director quoted [redacted] professor at the [redacted] at length. Rather, the director concluded that since the petitioner only obtained his Ph.D. in 1996 and was a postdoctoral fellow, a preparatory position, until 2002, the petitioner's number of years of experience in and of itself was not indicative of noteworthy expertise. Regardless, qualifications such as experience "do not justify a waiver of the certification process which takes these elements into account." *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 218. In addition, ten years of experience is merely one criterion for aliens of exceptional ability, a classification that normally requires labor certification. Thus, experience alone does not warrant a waiver of that requirement. *Id.* at 222.

We concur with counsel that the classification sought does not require that the petitioner have comparable achievements to the most experienced members of the field. We find, however, that the director's decision includes sufficient analysis of the evidence as to whether it was indicative of the petitioner's influence in the field. Thus, while we withdraw any inference that the petitioner must be comparable to the top members of his field, the director's inquiry into the significance of the petitioner's publication record was appropriate.

We do not presume that letters from colleagues are "biased." In fact, such letters are useful in explaining the petitioner's research and his role on various projects. Such letters, however, by themselves, cannot demonstrate an influence beyond the petitioner's circle of colleagues. Regarding the nonprecedent decision cited by counsel, he did not provide a copy of this decision. As such, we cannot determine the context of the statement on which counsel relies.[1] Regardless, nonprecedent decisions are not binding on us. With these considerations in mind, we will evaluate the reference letters submitted and the evidence supporting those letters.

[redacted] asserts that the petitioner's Ph.D. thesis focused "on the mechanism that satellite RNA inhibits virus symptoms." According to [redacted] the results of this work, presented in 1993 at a conference in Glasgow, "elicited why satellite RNA can be used for controlling many plant diseases caused by [the] *cucumber mosaic*

[1] This office, however, retained a copy of that decision. While the decision does state that the stature of the references cannot be ignored, the decision also stated that the stature of one's superiors is not decisive. The decision concluded that the alien's publication record supported the letters submitted. In the instant matter, the director's decision did consider the petitioner's publication record, but found that it was not indicative of an influence in the field. As will be discussed below, we will uphold that determination.

virus." The record establishes that [redacted] cited the petitioner's unpublished thesis in 1993, but there is no other evidence that this work has proven influential. A citation by one's professor is not indicative of an influence on the field as a whole.

The petitioner also submitted letters from [redacted] an [redacted] the [redacted] and the petitioner's coauthor, and [redacted] scientist at the same center. While [redacted]'s credentials are impressive, he characterizes the petitioner only as highly qualified and motivated. More specifically, he indicates the petitioner's work led to a "detailed understanding" of the rice stripe virus, "which is now being used by the collaborators in China." [redacted] provides more detail, stating:

> [The petitioner] is the first scientist who supplied the important evidence that the pvc2 gene of [the] rice stripe virus is a homologue of [a] counterpart of animal viruses. This finding is a breakthrough for the determination of Tenuivirues [sic] taxonomy status."

[redacted] the only independent reference, asserts that he met the petitioner at a meeting in 1997. Dr. Ding reiterates the statements made by [redacted] adding that the petitioner is one of the few individuals "with both [a] strong background [in] molecular biology and [who possesses] electron microscopy expertise." This claim is reiterated by one of the petitioner's references at Cornell University. Simple training in advanced technology or unusual knowledge, however, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221.

The petitioner's rice stripe virus results were published in *Virus Genes* in 1997, listing the petitioner as the second author. Seven subsequent articles cite this article, four of which are authored by the first author. While self-citation is a normal and expected process, it cannot demonstrate that the work is influential beyond the coauthors. Three independent citations over five years are not indicative of work that has influenced the field as a whole.

According to his curriculum vitae, while at [redacted] the petitioner studied the Luteovirus structural gene. [redacted] in whose laboratory the petitioner worked at [redacted] asserts that the petitioner "was able to adapt an efficient cloning and mutagenesis protocol that uses recombination in yeast to our plant virus experimental system." The result "facilitated the generation of numerous mutants that will allow us to better define regions of a virus protein involved in transmission." Finally, the petitioner "was also able to create chimeric viruses from two related virus species," which will provide information on "how viruses move within and between plant hosts." The record does not reflect that this work has been published or has otherwise influenced the field.

During his first stay at the [redacted] the petitioner focused on the bovine viral diarrhea virus (BVDV) in the laboratory of [redacted] According to [redacted]

> [The petitioner] implemented the necessary techniques quickly and worked passionately to overcome difficult obstacles. He initially developed the vectors derived from bacterial artificial chromosomes to determine the capacity of newly constructed vectors to stably maintain the bovine viral diarrhea genome. These vectors were crucial for the success of the project, because they allow the rapid construction of numerous alternative candidate vectors based on

engineered variants. This new approach virtually eliminated the tedious identification of convenient restriction enzymes, to construct and test a viral genome for the desired properties.

In addition, the petitioner "developed and utilized his highly sophisticated method to examine the genes that determine if the virus will be able to infect pigs, sheep or cattle." The results of this work demonstrated "that the E2 glycoprotein of [the] Bovine Viral Diarrhea virus is responsible for the species selectivity of the viruses."

[redacted] an associate professor at the [redacted] asserts that the petitioner's techniques, developed while working with BVDV, incorporated his discovery that "eight DNA fragments can be spliced into one DNA fragment in yeast." According to [redacted] this method "significantly reduced the time needed for DNA cloning." [redacted] further notes that this method has "a broad application including the study of [the] hepatitis C virus (HCV)," the petitioner's current focus. Other references from the University of Nebraska provide similar information. An article in the local *Daily Nebraskan* discusses the work with BVDV and its relevance to hepatitis C, but mentions by name only [redacted] and other references. The article does not mention the petitioner.

Simply demonstrating that the petitioner has developed new techniques is insufficient. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7.

At the time of filing, the petitioner's article on BVDV had just been published and had yet to be cited. The record contains no other evidence that laboratories other than those where the petitioner has worked have adopted his technique for splicing viral DNA fragments into yeast DNA.

The petitioner is listed as one of five researchers contributing to the proposed research described in a grant application. The period of research begins in May 2003, after the date of filing. Thus, this grant application is not evidence of the petitioner's accomplishments as of that date.

The petitioner is a full member of the [redacted] he application for membership indicates that full membership is restricted to those with three years postdoctoral experience and who provide "evidence of contributions to the field of virology." The membership materials from the society's website, submitted by the petitioner, indicates that membership is limited to those who have "published original investigations in virology and who are actively involved in virology research." Any research, in order to be accepted for publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who publishes original work (there would be little point in publishing work that is not original) or is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. Moreover, we note that professional memberships are one criterion for aliens of exceptional ability, a classification that normally requires a labor certification. As stated above, we cannot conclude that meeting one, or even the requisite three, warrants a waiver of that requirement.

At best, the petitioner's petition was filed prematurely, before independent experts had the opportunity to review and apply his recently published work, which reports his most significant accomplishment according

to the petitioner's references. Thus, his influence in the field beyond his colleagues cannot be gauged through evidence such as citations and letters from independent experts applying his techniques.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.